(2)

No. 05-1373

Supreme Court, U.S.
FILED
JUN 14 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JOYCE ANNE DABISH

Petitioner,

v.

DAIMERCHRYSLER CORPORATION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; STERLING STAMPING PLANT; UNITED AUTOMOBILE WORKERS LOCAL 1264

Respondents.

On Petition For Writ Of Certiorari To The United States Of Appeals For The Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

JOYCE ANNE DABISH
IN PRO SE

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QUESTIONS PRESENTED

Did the Sixth Circuit Court of Appeals violate It's own court rules by improperly hearing and denying Plaintiff's motion to remand the lawsuit back to the Federal District Court in Detroit, Michigan?

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OPINIONS BELOW

The Plaintiff is appealing from the September 19, 2005 Order of the United States Sixth Circuit Court of Appeals which is attached as page 1a of the Appendix to the Plaintiffs' Reply Brief in Support of the Petition for Writ of Certiorari. The Order of United States District Court for the Eastern District of Michigan dated May 25, 2005 is attached as pages 2a-5a of the Appendix. The Order of the United States Sixth Circuit Court of Appeals dated April 13, 2005 is on page 6a of the Appendix. The order of the United States Sixth Circuit Court of Appeals is dated February 9, 2005 and is attached on pages 7a-8a of the Appendix. The Opinion and Order of the United States District Court for the Eastern District of Michigan is attached on pages 9a-32a of the Appendix. The Judgment of the District Court is dated March 31, 2004 and is attached on page 33a of the Appendix.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S. C. β 1254(1). On September 19, 2005; The United States Sixth Circuit Court of Appeals issued It's last decision. Plaintiff's Petition for Writ of Certiorari was filed on December 16, 2005 and not docketed until April 28, 2006 because the Petition had to be returned twice for corrections, and omissions.

RULES INVOLVED

Rule 60(b) of the Federal Rules of Civil Procedure (**Relief from Judgment or Order**) provides:

(b)Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.
On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based had been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under the subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., β 1655, or to set aside judgment of fraud upon the court. Writs of Coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the

procedure for obtaining any relief from a judgment shall be by an independent action.

STATEMENT OF THE CASE

Plaintiff Petitioner Joyce Anne Dabish ("Plaintiff") filed the underlying lawsuit against Defendant Appellee DaimlerChrysler (Defendant") and the U.A.W., in pro se on June 26, 2002. Plaintiff retained E. Patrick Murray in August of 2002. Mr. Murray finally filed a First Amended Complaint on October 21, 2002, alleging a Breach of contract against DaimlerChrysler (Count 1), Breach of Fiduciary Duty against DaimlerChrysler under ERISA (Count II), Breach of Contract and Breach of Fiduciary Duty against the U.A.W. Count III) under Section 301 of the LMRA and ERISA and Wrongful Termination Against Public Policy against DaimlerChrysler under Michigan common law (Count IV). In the original suit the Plaintiff stated that she was wrongfully terminated because she had been told by U.A.W. Local 1264 Benefit Representatives that if she did not sign and/or complete the "Final Retirement Papers" that she would not have to retire. The Plaintiff as of July 1, 2002 had not completed these documents and on those grounds contested her removal from Sterling Stamping. Plaintiff filed In Pro Se on July 12, 2002 against DaimlerChrysler, U.A; .W. International Union, Sterling Stamping Plant and U.A.W. Local 1264 who the Plaintiff held accountable for the actions of the Benefit Reps. Plaintiff was deposed on December 5, 2002. Plaintiff wanted E. Patrick Murray to depose the two Benefit Reps namely, Tom Nizich and Kathleen Scorpio but Mr. Murray refused to depose either Benefit Representative.

He told the Plaintiff that DaimlerChrysler refused to give him documents and media that he had allegedly requested. He never told the Plaintiff that he did no discovery at all on her behalf of her case and did tell the Plaintiff that discovery closed on January 31, 2003. Mr. Murray expressed surprise at the DaimlerChrysler motion filing for a Motion for Summary Judgment on February 28, 2003. Mr. Murray never told the Plaintiff that the U.A.W. also filed Motion for summary Judgment on March 31, 2003. Instead he expressed surprise at the granting of the motion on March 31, 2004 and the Order also on March 31, 2004.Appx. 9a-33a The Plaintiff does not have legal secretaries or print shops to prepare her legal documents. The date of May 31, 2004 which was typed in error was just that a typing error and Mr. Tuyn is clearly aware of that fact and is being ludicrous to suggest the error was done intentionally by the Plaintiff. Plaintiff was forced into filing an appeal to the United States Sixth Circuit Court of Appeals by David Sinutko who never filed a Notice of Appearance on behalf of the Plaintiff and never submitted an Appeal Brief to the Court. Instead David Sinutko "client-dumped" the Plaintiff allegedly for non-payment of legal fees when he clearly knew the Plaintiffs' financial situation. The Plaintiff filed July 14, 2004 to remand her case back to the Federal District Court in Detroit not knowing the filing was in the wrong jurisdiction. The Sixth Circuit did not enter an Opinion until February 9, 2005 Appx. p. 7a; nine (9) months after the filing date of July 14, 2004. The Court did not brother to inform the Plaintiff that her filing was in the wrong jurisdiction. Instead, the Plaintiff was allowed to file for reconsideration and was again denied by the Court on April 13, 2005 Appx. p. 6a and at that point the Court informed the Plaintiff that her filing was in the wrong jurisdiction. If the Court could have informed the Plaintiff on April 13, 2005 then it is quite clear that the Sixth Circuit could have told the Plaintiff immediately upon receipt of her filing that the

motion needed to be filed in District Court in Detroit. On May 11, 2005 the Plaintiff did file the Rule 60 Motion to Remand in Detroit District Court. The Motion was denied on May 25, 2005. Appx. p. 2a. On June 15, 2005 the Plaintiff appealed that decision back to the Sixth Circuit where the original appeal is still pending. On September 19, 2005 the Sixth Circuit denied the motion. Appx. p. 1a. Plaintiff filed for Petition for Writ of Certiorari because the Sixth Circuit could have told the Plaintiff immediately upon receipt of the filing of the wrong jurisdiction. The Court chose not to inform the Plaintiff and clearly denied the Plaintiff her right of appeal and due process under the normal appeal procedure. Respondents' Brief in Opposition holds that there are no rules stating that a pro se litigant must be informed of court rules or of the procedure to remand a case to any district court. The Plaintiff was forced by the second attorney she supposedly retained into filing the Appeal with the Sixth Circuit. David Sinutko should have told the Plaintiff that a Motion to Remand the case back the District Court in Detroit was the proper course. His motive was money since he: (1) never filed a notice of appearance on behalf of the Plaintiff; and (2) he never filed a brief on appeal to appeal the Plaintiff's case. Since the Plaintiff was in the Sixth Circuit more by force than by choice; she simply filed the Motion To Remand in that Court not knowing it was the wrong jurisdiction. Even though there is no authority mandating "instruction" to pro se litigants; when they make an improper filing in any court they should at least be told they are in the wrong court. By not informing the Plaintiff of the improper filing; the Sixth Circuit Court of Appeals has contributed: (1) to the nation-wide issue of "court case overload" by ruling; (2) on a case that according to It's own court Rules It should not have ruled on; (3) because the Sixth Circuit improperly ruled on this case and did not inform the Plaintiff until the time frame for such an motion to be filed had passed; (4) the

Plaintiff had no recourse but to file a continued appeal before this Honorable Supreme Court in a matter that should never have arrived at this point and which should not have come before this Supreme Court. Even if in fact there are no stated laws requiring courts to inform pro se litigants of filings in wrong jurisdictions common sense should dictate to any court that wrong filings only clog already full court dockets and prevent particular courts from hearing more relevant cases. There is no reason for any court to have rules if that court does not follow It's own rules. There is no stated jurisdiction for the United States Sixth Circuit Court of Appeals to have ruled on the Plaintiff's Original Motion of July 14, 2004 to Remand her case back to the Federal District Court in Detroit, Michigan. The Sixth Circuit Court should have returned the Plaintiff's pleadings and told her that she was in the wrong jurisdiction. The Sixth Circuit would have saved Itself from having to rule on this case at all but more importantly the Sixth Circuit would have not clogged It's docket and should have docketed cases that did not belonged in It's jurisdiction. It is ludicrous for Mr. Tuyn to state on Page 6 of his brief that pro se litigants are not excused from knowing court rules while excusing the Sixth Circuit Court of Appeals from not having to follow It's own court Rules. Clearly, if the Plaintiff was required to follow the rules of any court it should also be true that the Sixth Circuit should follow It's own rules which clearly DO NOT included ruling on Motions To Remand cases back to the Federal District Court in Detroit, Michigan.

REASONS FOR GRANTING THE WRIT

THE ISSUE COUTS HEARING CASES NOT IN THEIR JURISDICTION IS CLEARLY RELEVNT TO ALL COURTS AND TO ALL LITAGANTS

I. The Plaintiff is like any litigant who is in Pro Se. There are legal issues that arise in any case that are new issues to the Plaintiff and for which the Plaintiff did not have the matter of remanding a case back to the district court come up as an issue in previous litigation. The Sixth Circuit clearly contributed to "court clog" when It took a case that did not belong in It's jurisdiction according to It's own court rules. The Sixth Circuit clearly denied the Plaintiff the right to have the full due process of the Motion to Remand the case back to the District Court by not only delaying their opinion from July 14, 2004 until February 9, 2005 but also by not brothering to tell the Plaintiff at that point that the Motion was in the wrong jurisdiction. The Court conveniently waited until April 13, 2006 to finally inform the Plaintiff that the Motion was filed in the wrong court. Mr. Tuyn is saying on Page 6 of his brief that it is not incorrect for the Sixth Circuit to have done that since their ruling prevented the Plaintiff from being able to continue her case in the District Court. As long as the Sixth Circuit Court was ruling against the Plaintiff Mr. Tyun does not have a problem with the Court being in violation of It's own rules. Since the Sixth Circuit was in violation of It's own rules clearly the Court had no right to tell the Plaintiff that she was to blame for not knowing the court rules since her filing could have been returned to her and she could have been told that she was in the wrong jurisdiction. On page 7 of his brief Mr. Tuyn states that the Plaintiff could have hired someone with legal expertise. The Plaintiff was: (1) forced out of her job July 1, 2002; (2) E. Patrick Murray the former law partner of Mr. Tuyn was retained by the Plaintiff;(3) clearly his lack of expertise is known to Mr. Tuyn since Mr. Tuyn is no longer associated with E. Patrick Murray;(3) the Plaintiff was diagnosed with breast cancer September 30, 2004 and has not been able to work; (4) the Plaintiff has had to declared Chapter 7 bankruptcy on January 26, 2006 and (5) the

Plaintiff is not a lawyer and has never been to law school and/or taken and law courses. Mr. Tuyn's statement that the Plaintiff could have retained legal counsel is financially impossible. The bankruptcy been discharged and the Plaintiff has no funds to pay for legal assistance. Also, the Plaintiff is still under going cancer treatment and diagnosis. Mr. Tuyn's statement on Page 7 of his brief that the Plaintiff "is hardly a novice to civil litigation" has no basis in fact. Handling cases in pro se does not make anyone a "Legal Expert" and each case has different issues that do not necessarily carry over to the next case. Mr. Tuyn states on page 8 of his brief that the Plaintiff was "unhappy with the legal representation in the lower court proceedings." Since Mr. Tuyn is the former law partner of E. Patrick Murray he will agree with the Plaintiff who stated that Mr. Murray conducted NO defense of her case. Since the Plaintiff had no funds to retain legal counsel acting in pro se was the only option.

THE DECISION OF THE SIXTH CIRCUIT DENYING THE PLAINTIFF'S MOTION TO REMAND HER CASE BACK TO THE FEDERAL DISTRICT COURT IN DETROIT MUST BE OVERTURNED BY THIS COURT

The decision of the United States Sixth Circuit Court of Appeals must be overturned because that was a decision that should never have been ruled on by that Court. There is no where in the court rules of the Sixth Circuit that state It has jurisdiction to rule on cases where a petitioner or a respondent file a Motion To Remand a case back to the District Court in Detroit, Michigan. The Sixth Circuit violated It's own Court Rules in issuing an opinion in the Plaintiff's case. The opinion should be overturned. Other plaintiffs and respondents should also not be victimized in that manner. The Sixth Circuit clearly played "legal entrapment". The Sixth Circuit put a case on It's docket that should not have been there and then ruled on that case but didn't bother to tell the Plaintiff about the wrong jurisdiction until it was too late for the Plaintiff to file in Detroit Federal District Court. The Sixth Circuit clearly "entrapped" the Plaintiff by: (1)

delaying their first ruling for nine months with no notice to the Plaintiff of the wrong jurisdiction; (2) informing the Plaintiff on April 13, 2005; and (3) using the appeal process to deny due process to the Plaintiff by denying the Plaintiff the opportunity for a timely Motion filing. The actions of the Sixth Circuit are clearly a travesty of justice for that Court to have used It's appeal function to rule on a matter that was not within the domain of It's Court Rules and to deny the Plaintiff the opportunity to have the Motion heard in the District Court. The decision of the Sixth Circuit must be reversed because this Honorable Supreme Court must tell all petitioners and all respondents that they have the right to be heard in the appropriate jurisdiction and that no court should be able to use "court rules" to deny any litigant the right to have their case heard. The Sixth Circuit clearly abused It's discretionary power by hearing a matter that was not in It's jurisdiction and delaying It's opinion and jurisdiction information to the Plaintiff clearly to use court rules to Entrap the Plaintiff and to prevent the Plaintiff from being able to present that Motion in the District Court.

A. THE PLAINTIFF IS IN PRO SE

On page 4 of his brief Mr. Tuyn states that the Plaintiff changed the date of the District court Opinion From March 31, 2004 to May 31, 2004, which Mr. Tuyn states:" which is clearly incorrect and improper." Since the Plaintiff is acting In Pro Se and is not a lawyer and does not have a secretary or a print service to prepare her legal documents the Plaintiff must hand prepare all documents submitted to any court. The wrong date was clearly a typing error. On Page 6 of his brief Mr. Tuyn in a footnote states that the Plaintiff did not attach the February 9, 2005 or the April 13, 2005 Sixth Circuit opinions to the Writ. Again the Plaintiff is acting In Pro Se and did not know that those opinions need to be included. On Page 7 of his brief Mr. Tuyn states in a footnote:" Plaintiff is college-educated." Clearly a college education did not do anything for the Plaintiff: (1) the Plaintiff was forced out of

her job ;(2) the cancer diagnosis caused the Plaintiff to go into bankruptcy; and(3) the Plaintiff will likely lose her home and all of her property. Clearly, the Plaintiff did not profit from being "college-educated." The Plaintiff's Petition was returned twice to correct format and for inclusion of omitted opinions. The Plaintiff is In Pro Se and had difficulty with the design and format of the Petition.

II. THE PROCESS AND THE OPINIONS OF THE SIXTH CIRCUIT ARE UNCONSTITUTIONAL AND CLEARLY EXHIBIT AN ABUSE OF JUDICIAL POWER AND NOT DISCRETIONARY POWER RATHER A DENIAL OF JUDICIAL DUE PROCESS

No court can violate its own rules and say it is "judicial discretion." If no person is above the law then no court is above its own stated rules. If courts themselves do not adhere to their own rules then clearly it would not be incumbent upon any one to obey any rules. Courts must set the example by the strict adherence to their own rules if they clearly expect all litigants to have that same adherence. This Honorable Supreme must demand that all courts under It's jurisdiction must adhere to their own court rules and not use judicial discretion at all if any court rules are violated and litigants are denied any part of the judicial process. Clearly this Honorable Court can see that the Sixth Circuit by hearing the Plaintiffs' motion denied the Plaintiff the right to the normal judicial process for which clearly the Plaintiff did have that right. No court should be permitted by this Court to clog its docket with cases that do not belong in their jurisdiction and all courts should be ordered by this Court to tell all Pro Se litigants of there wrong filing when they file in the wrong jurisdiction.

CONCLUSION

This petition is important because it deals with how all litigants especially pro se litigants are treated in the various courts. The concept of fairness and equal justice under the law and under the applicable court rules are also at issue. Courts must adhere to their established rules as they expect all who come before them to do the same. The Honorable Supreme Court must demand that all courts abide by their rules and when they do not this Court must overturn that decision. Courts cannot be allowed to take cases that do not belong in their jurisdiction and then rule on them. This situation is already present in courts across the country. This Court must end this clearly time-consuming, court clogging and absolutely wasteful practice that costs litigants and taxpayers millions upon millions of dollars in unnecessary court costs and never ending appeals through this country's' court systems. This matter is worthy of the review of this Court. The decision of the United States Sixth Circuit Court of Appeals should be reversed for all of the reasons given.

For the foregoing reasons, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED SEPTEMBER 19, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1583

JOYCE ANNE DABISH,

Plaintiff-Appellant,

v.

DAIMLERCHRYSLER CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; STERLING STAMPING PLANT UNITED AUTOMOBILE WORKERS LOCAL 1264,

Defendants-Appellees.

Before: KENNEDY, CLAY, and GIBBONS, Circuit Judges.

Joyce Anne Dabish again moves to remand her appeal in this labor law case because she received ineffective representation from her counsel. As this court has previously stated, there are no Fifth or Sixth Amendment rights to effective counsel in a civil case such as this one. *Father & Sons Lumber & Bldg. Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991). The motion to remand is denied. Dabish is warned that if she raises this issue again she will be subject to sanctions. *See* Fed. R. App. P. 38.

Appendix A

Dabish received a six-month extension of time in which to file her brief due to illness. Dabish's motion shows that she has now recovered sufficiently to be able to file her brief. The clerk's office is directed to establish a briefing schedule.

ENTERED BY ORDER OF THE COURT

s/ Leonard Grunji
Clerk

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DENYING PLAINTIFF'S MOTION TO REMAND DATED MAY 25, 2005

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 02-72659
Hon. Gerald E. Rosen

JOYCE ANNE DABISH,

Plaintiff,

v.

DAIMLERCHRYSLER CORPORATION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and STERLING STAMPING PLANT UNITED AUTOMOBILE WORKERS LOCAL 1264,

Defendants.

ORDER DENYING
PLAINTIFF'S MOTION TO REMAND

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on *May 25, 2005*

PRESENT: Honorable Gerald E. Rosen
United States District Judge

Appendix B

In an opinion and order and accompanying judgment dated March 31, 2004, the Court granted Defendants' motions for summary judgment and dismissed this case. Plaintiff subsequently appealed this ruling to the Sixth Circuit Court of Appeals, and this appeal remains pending. Recently, Plaintiff requested that the Sixth Circuit "remand" the case back to this Court, apparently so that she can pursue additional discovery that, in her view, her attorney neglected to seek while the district court litigation was pending. The Sixth Circuit denied this motion, as well as a subsequent motion for reconsideration, holding that Plaintiff could not abandon her appeal and resume the district court litigation without first persuading this Court to vacate its summary judgment decision via a motion under Fed. R. Civ. P. 60(b).

In an apparent effort to heed the Sixth Circuit's instructions, Plaintiff has filed a May 11, 2005 motion requesting that this Court "remand" this case from the Court of Appeals. In essence, Plaintiff seemingly wishes to resume the litigation in this Court, evidently so that she can conduct further discovery in support of her claims. Unfortunately, despite the Sixth Circuit's instructions in its two recent orders, Plaintiff has failed to suggest why an award of Rule 60(b) relief might be warranted here, or even which subsection of this Rule might arguably apply.

Nonetheless, it is abundantly clear to this Court that no such relief can be awarded. The relevant clause of Rule 60(b) under the circumstances is subsection (1), which authorizes relief from a judgment that was the product of "mistake, inadvertence, surprise, or excusable neglect." Fed. R. Civ. P. 60(b)(1). More specifically, challenges to the adequacy of

an attorney's representation of a client typically are addressed under the "mistake" or "excusable neglect" clauses of Rule 60(b)(1). See *United States v. Reyes*, 307 F.3d 451, 456-58 (6th Cir. 2002); *McCurry v. Adventist Health System/Sunbelt, Inc.*, 298 F.3d 586, 593-95 (6th Cir. 2002); *FHC Equities, L.L.C. v. MBL Life Assurance Corp.*, 188 F.3d 678, 684-87 (6th Cir. 1999). Yet, these same decisions further establish that "clients must be held accountable for the acts and omissions of their attorneys," and that "out-and-out lawyer blunders—the type of action or inaction that leads to successful malpractice suits by the injured client—do not qualify as 'mistake' or 'excusable neglect' within the meaning of [Rule 60(b)(l)]." *McCurry*, 298 F.3d at 594-95 (internal quotation marks and citations omitted).

So far as can be gleaned from her motion and supporting documents, this is precisely the theory of relief advanced by Plaintiff—namely, that she should be given a second bite at the discovery apple because of the inadequate performance of her counsel while this case was pending before this Court. The courts have been unwilling to make an exception from the usual finality of judgments under these circumstances. *See McCurry*, 298 F.3d at 595. In addition, Plaintiffs request for relief under Rule 60(b)(1) is untimely, as her motion was filed more than one year after the entry of the Court's March 31, 2004 opinion and order and judgment. Consequently, the Court finds no basis for granting relief under Rule 60(b), and Plaintiff must pursue any challenges to this Court's rulings via her pending Sixth Circuit appeal.

Appendix B

For these reasons,

NOW, THEREFORE, IT IS HEREBY ORDERED that Plaintiff's May 11, 2005 motion to remand is DENIED.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

Dated: May 25, 2005

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED APRIL 13, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1583

JOYCE ANNE DABISH,

Plaintiff-Appellant,

v.

DAIMLERCHRYSLER CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; STERLING STAMPING PLANT UNITED AUTOMOBILE WORKERS LOCAL 1264,

Defendants-Appellees.

ORDER

Before: MERRITT, MOORE and GILMAN, Circuit Judges.

Joyce Anne Dabish moves the court to reconsider this court's order denying her motion to remand this case arising under labor law and ERISA.

In her motion to reconsider, Dabish requests a remand to obtain additional evidence. A party seeking to have a

district court vacate its decision while the case is on appeal must initially file a Federal Rule of Civil Procedure Rule 60(b) motion in the district court. *Bovee v. Coopers & Lybrand C.P.A.*, 272 F.3d 356, 359 n.1 (6th Cir. 2001); *First Nat'l Bank v. Hirsch*, 535 F.2d 343, 346 (6th Cir. 1976). If the district court is disposed to grant the motion, it may enter an order so indicating, and the party may then file a motion to remand in this court. *Id.* Dabish has not followed this procedure.

The motion to reconsider is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Grunji
Clerk

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED FEBRUARY 9, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-1583

JOYCE ANNE DABISH,

Plaintiff-Appellant,

v.

DAIMLERCHRYSLER CORPORATION; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; STERLING STAMPING PLANT UNITED AUTOMOBILE WORKERS: LOCAL 1264,

Defendants-Appellees.

ORDER

Before: MERRITT, MOORE, and GILMAN, Circuit Judges.

Joyce Anne Dabish appeals pro se a district court grant of summary judgment in favor of the defendants in this labor and ERISA case. 29 U.S.C. §§ 185 et seq. and 1001 et seq. Dabish has filed a motion to remand the case to the district court. Dabish claims that she did not receive adequate legal representation from her attorney in the district court, so a

remand is appropriate. DaimlerChrysler has filed a response to the motion, and Dabish has filed a reply to the response.

Concerning Dabish's argument about adequate legal representation, there is no Sixth Amendment right to counsel in a civil case. *Fathers & Sons Lumber & Supplies, Inc. v. NLRB*, 931 F.2d 1093, 1097 (6th Cir. 1991). Moreover, the Fifth Amendment right to effective assistance of counsel does not apply in civil cases except for deportation proceedings or other government-initiated actions. *Id.* Dabish's case does not involve a government-initiated action. Because Dabish has no right to effective assistance of counsel, her argument based on not receiving adequate legal representation lacks merit.

The motion to remand is denied. The clerk is directed to establish a briefing schedule.

ENTERED BY ORDER OF THE COURT

s/ Leonard Grunji
Clerk

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATED MARCH 31, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 02-72659
Hon. Gerald E. Rosen

JOYCE ANNE DABISH,

Plaintiff,

v.

DAIMLERCHRYSLER CORPORATION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and STERLING STAMPING PLANT UNITED AUTOMOBILE WORKERS LOCAL 1264,

Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on *MAR 31 2004*

PRESENT: Honorable Gerald E. Rosen
United States District Judge

Appendix E

I. INTRODUCTION

Plaintiff Joyce Anne Dabish filed a *pro se* complaint with this Court on June 26, 2002, seeking to revoke her acceptance of an early retirement offer made by her employer, Defendant DaimlerChrysler Corporation, and negotiated by her collective bargaining representative, Defendant UAW Local 1264. In an October 21, 2002 first amended complaint filed on her behalf by her present counsel, Plaintiff advances claims under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and Michigan common law, all in an effort to rescind her apparent acceptance of DaimlerChrysler's early retirement offer.

By motions filed on February 28, 2003 and March 4, 2003, respectively, Defendants DaimlerChrysler and UAW Local 1264 now seek summary judgment in their favor on all of Plaintiff's claims, state and federal alike. In untimely responses filed on May 30, 2003 and June 2, 2003, Plaintiff concedes that she cannot pursue a state-law claim of wrongful termination in violation of public policy, where any such state-law claim surely would be preempted by federal labor law in light of Plaintiff's status as member of UAW Local 1264 whose employment with DaimlerChrysler was governed by a collective bargaining agreement. Nonetheless, Plaintiff contends that she has produced sufficient evidence in support of her breach-of-contract and ERISA claims, where she purportedly was told by union representatives that she could revoke her acceptance of the early retirement plan at any time up until she executed the final retirement paperwork.

Defendants filed reply briefs in further support of their motions on June 11 and 12, 2003.

Having reviewed the parties' submissions and the record as a whole, the Court finds that these materials sufficiently disclose the relevant allegations, facts, and legal arguments, and that oral argument would not significantly aid the decisional process. Accordingly, the Court will decide Defendants' motions "on the briefs." *See* Local Rule 7.1(e)(2), U.S. District Court, Eastern District of Michigan. This Opinion and Order sets forth the Court's rulings.

II. FACTUAL BACKGROUND

The pertinent facts of this case are relatively straightforward. Moreover, there is scant opportunity for dispute of these facts, where Plaintiff took no depositions, Defendants apparently deposed only Plaintiff herself, and the record otherwise consists almost entirely of materials related to the early retirement offer extended by Defendant DaimlerChrysler to certain of its hourly employees, including Plaintiff.

Plaintiff Joyce Anne Dabish has been employed by Defendant DaimlerChrysler Corporation since September of 1976, and was 61 years old at the time she commenced this suit. At all relevant times, Plaintiff worked as an hourly production worker at DaimlerChrysler's Sterling Stamping Plant in Sterling Heights, Michigan. The terms of Plaintiffs employment were governed by a collective bargaining agreement ("CBA") between DaimlerChrysler and the Defendant UAW.

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In March of 2002, DaimlerChrysler promulgated an Incentive Program for Retirements ("IPR") for eligible union-represented hourly employees at several of the company's manufacturing facilities, including the Sterling Stamping Plant. The IPR was negotiated with the UAW as part of DaimlerChrysler's company-wide effort to reduce its work force through voluntary attrition. The IPR offered cash incentives and vehicle vouchers, but did not alter the pension or other benefits an employee otherwise would receive upon retirement.

The IPR was offered to employees in the form of a letter describing the program, which was captioned "2002 Incentive Program for Retirements Conditional Offer Letter." (First Amended Complaint, Ex. A.) The letter established a "conditional offer period from March 13, 2002 through March 28, 2002," during which the employee was required to sign and date the form to indicate his or her acceptance or rejection of the offer. (*Id.*) In the section to be signed by employees who accepted the offer, the letter stated:

> I hereby accept this conditional offer under the Incentive Program for Retirements. The effective date of my retirement will be April 30, 2002 unless a two-month extension of my retirement date is required by Management.
>
> I acknowledge that Management will make the final determination of my retirement date and may require a two-month extension of my retirement date to June 30, 2002.

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I acknowledge that Management will make a final selection of separations to be accepted under this Program on the basis of corporate service.

I acknowledge that I have had reasonable time to consider this conditional offer, that I have been informed to discuss it with my attorney and/or financial advisor, and that my acceptance of this conditional offer is completely voluntary on my part and was in no way forced upon me by DaimlerChrysler Corporation,

I acknowledge that my election to separate under this Incentive Program for Retirements is irrevocable after March 28, 2002 by me or by others.

In January of 2002, Plaintiff attended a regular membership meeting of UAW Local 1264, and learned that an early retirement offer would be forthcoming. On January 24, 2002, she received an estimate of her benefits under the DaimlerChrysler-UAW pension plan. When Plaintiff arrived at work on March 13, 2002, she received a copy of the above-cited IPR letter, accompanied by a package of materials that further explained this early retirement offer and estimated the retirement benefits Plaintiff would receive if she accepted. These materials reiterated that "[i]f you accept this conditional offer, you must retire on the date indicated in your offer letter, subject to any determination by Management that an extension of that date is needed and also subject to any conditional terms that the application for retirement be accepted by Management as indicated in your conditional offer letter." (Plaintiff's Response, Ex. 3, IPR package at 2.)

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On March 18, 2002, UAW Local 1264 conducted an informational meeting to "explain all options available to members who have received an I.P.R. package." (Plaintiff's Response, Ex. 4.) Because of a doctor's appointment, Plaintiff was unable to attend this meeting, but she was assured that she could contact her union representatives to address any questions she might have about the early retirement offer. Accordingly, on March 25, 2002, Plaintiff went to the Local 1264 office and met with two union benefit representatives, Tom Nizich and Kathy Scorpio-Butina.

This March 25, 2002 meeting is pivotal to Plaintiff's claims in this case. According to the complaint and the testimony at her deposition, Plaintiff had not yet signed her offer letter, and still had not made up her mind whether to accept the offer. Plaintiff testified that she asked Nizich and Scorpio-Butina, "If I sign this letter, and later on I decide that I can't go through with this retirement, can I still change my mind?" (Plaintiff's Dep. at 39.) According to Plaintiff, both Nizich and Scorpio-Butina assured her that "[y]ou have until the day you sign the final retirement papers to change your mind." *(Id.)* There was no discussion of the language of the IPR letter stating that an employee's acceptance was "irrevocable after March 28, 2002." Plaintiff signed the letter that same day, indicating her acceptance of the IPR offer.[1] She acknowledged at her deposition that she read the entire letter before she signed it, including the statement that her acceptance was "irrevocable." (Plaintiff's Dep. at 109, 112.)

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1. To be accurate, the letter reflects a signature date of ***April*** 25, 2002. (*See* Complaint, Ex. A.) Plaintiff confirmed at her deposition, however, that this date is incorrect, and that she actually signed the letter on March 25, 2002 (*See* Plaintiff's Dep. at 35, 40.)

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On June 5, 2002, Morris Simms, DaimlerChrysler's Senior Manager for Human Resources at the Sterling Stamping Plant, approved Plaintiff's eligibility for the IPR offer, and established June 30, 2002 as her retirement date. That same day, however, Plaintiff submitted a letter to Alvin Davis, the supervisor of union relations at the plant, stating that "I do not wish to accept the retirement package" and "do not wish to retire on June 30, 2002." (Plaintiff's Response, Ex. 7.) On June 10, 2002, Plaintiff sent another letter to Davis, reiterating her desire to decline the early retirement offer and continue working. (Plaintiff's Response, Ex. 8.)

Following this initial correspondence, Plaintiff sent two additional letters to more senior UAW officials, stating that she had been told by Tom Nizich that "I could reverse my decision to retire by not signing the final retirement papers," but that Nizich now was "saying that the Company will force me to retire." (Plaintiff's Response, Ex. 9)[2] In response, Plaintiff received a June 20, 2002 letter from John Rudzinski, the International Benefit Representative for UAW's DaimlerChrysler Department, stating that the terms of the IPR were "totally different from a 'regular retirement.'" (Plaintiff's Response, Ex. 10.) In particular, Rudzinski explained:

> Under normal circumstances, an employee has the right to revoke their decision up till the last day

2. Plaintiff has produced a memo, apparently authored by Nizich, indicating that Plaintiff was one of seven employees represented by Local 1264 who sought to revoke their acceptance of the IPR offer. (*See* Plaintiff's Response, Ex. 11.)

> of the month prior to the commencement of retirement benefits.
>
> However, as stated just above your signature on your acceptance of the offer, your decision is irrevocable after March 28, 2002. Additionally, this was explained at the informational meetings held for anyone interested in the incentive offer.

(*Id.*)

When Plaintiff reported for work as usual on July 1, 2002, she was told that she was now considered a retired employee, and she was escorted from the facility. To date, Plaintiff apparently has never completed the paperwork necessary to begin collecting retirement benefits. Instead, on July 3, 2002, Plaintiff sent a letter to the President of UAW Local 1264 protesting her removal from active employment. (*See* Plaintiff's Response, Ex. 12.) When Local 1264 declined to pursue her grievance, Plaintiff sent a letter to UAW President Ron Gettelfinger appealing this decision. In a letter dated December 5, 2002, Gettelfinger denied this appeal, stating:

> Your appeal to this office postmarked September 12, 2002 has been considered. Your submission chronicles the circumstances surrounding your contention that you should be returned to active employment.
>
> Investigation reveals that a 2002 Incentive Program for Retirements was offered at the

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Sterling Stamping Plant with a conditional offer period from March 13, 2002 through March 28, 2002 for eligible represented hourly employees. Eligible employees received a letter explaining the offer in sufficient detail.

You have made your position the subject of an appeal to the Local Union Membership and the UAW National DaimlerChrysler Department. Unable to locate a violation of the agreement or a duty breached, both determined your appeal requires an interpretation of the agreement.

For the reasons cited above, the UAW International DaimlerChrysler Department has determined that the issues raised in your communications do not depict a violation of the Agreement; it requires an interpretation of the 2002 Incentive Program for Retirements Conditional Offer Letter. It is held that your election to separate under the Incentive Program for Retirements is irrevocable.

The UAW International DaimlerChrysler Department is responsible for negotiating and implementing the agreement and any supplement thereof. Because their interpretation is correct, I am ruling on this appeal pursuant to Article 33, Section 2(b) of the International Constitution.

The appeal is denied and there is no further appeal from this decision.

(Plaintiff's Response, Ex. 14.)

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On June 26, 2002, while she was still pursuing her remedies under the CBA, Plaintiff commenced this action by filing a terse two-page *pro se* complaint seeking reinstatement to active employment. She subsequently retained counsel, through whom she has filed a first amended complaint that more thoroughly presents her allegations and theories of recovery. Specifically, this amended pleading advances breach of contract and breach of fiduciary duty claims against DaimlerChrysler, the UAW, and UAW Local 1264, arising under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and Michigan common law. Although Plaintiff now concedes that she cannot pursue her state-law claim of wrongful discharge, she contends that she has produced sufficient evidence to sustain her federal theories of recovery.

III. ANALYSIS

A. The Standards Governing Defendants' Motions

Through their present motions, Defendants seek summary judgment in their favor pursuant to Federal Rule of Civil Procedure 56. Under this Rule, summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In this case, the record is limited and largely undisputed, resulting in a fairly straightforward Rule 56 inquiry. Accordingly, the Court now turns to this task.

B. Plaintiff Has Failed to Produce Evidence to Sustain Either Prong of Her Hybrid § 301 Claim.

As noted, Plaintiff has acknowledged that the state-law theory of recovery asserted in her first amended complaint is preempted by federal law—specifically, § 301 of the LMRA, 29 U.S.C. § 185—by virtue of Plaintiff's status as a member of UAW Local 1264 and the existence of a CBA between the union and her employer, DaimlerChrysler. Thus, to the extent that Plaintiff's claims rest upon an alleged breach of an obligation owed by her employer under the CBA or a related, collectively bargained agreement, they are governed by the standards of so-called "hybrid § 301" claims. As this Court previously has observed:

> It is well-settled that for a union employee to maintain an action for breach of a labor contract against his employer, he must also establish that his union breached its duty of fair representation. *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903, 17 L.Ed.2d 842 (1967). Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation. *Vaca v. Sipes, supra*; *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983). The two claims are inextricably interdependent: To prevail against either the company or the Union, the employee-plaintiff must not only show

> that his discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union. *Id.*, 103 S.Ct. at 2290-91. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both. *Id.* at 2291.

Cotter v. DaimlerChrysler Corp., 87 F. Supp.2d 746, 756 (E.D. Mich. 2000). Defendants argue, and the Court agrees, that Plaintiff cannot satisfy either prong of this standard.

First, regarding the breach-of-contract element of a hybrid § 301 claim, Plaintiff does not contend that DaimlerChrysler breached any provision of the underlying CBA. Rather, her claim rests upon the terms of the letter she signed on March 25, 2002, reflecting her apparent acceptance of the early retirement offer extended through Daimler Chrysler's 2002 Incentive Program for Retirements ("IPR"), Although the parties do not address the point, it is evident to the Court that the IPR, as an agreement negotiated between DaimlerChrysler and the UAW that supplements the underlying CBA, should be "treated in the same manner as the collective bargaining agreement" itself. *Cotter*, 87 F. Supp.2d at 757.[3] In particular, to determine whether the IPR was breached, the Court looks first to "the plain meaning

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3. Because of the applicability of § 301 standards to the CBA and the IPR alike, the parties' various citations to Michigan court decisions are not particularly helpful here. Given the parties' apparent agreement that federal law governs the terms of Plaintiff's relationship with her employer, the Court fails to see why it should look to rulings on Michigan contract law.

of the agreement." *Roeder v. American Postal Workers Union, AFL-CIO*, 180 F.3d 733, 737 (6th Cir. 1999).

If the terms of the IPR are defined solely by reference to the letter and accompanying written materials received by Plaintiff, it is clear that DaimlerChrysler did not breach this agreement by refusing to allow Plaintiff to rescind her acceptance of the early retirement offer, The letter signed by Plaintiff states in the plainest of terms that her acceptance was "***irrevocable after March 28, 2002*** by me or by others." (First Amended Complaint, Ex. A (emphasis added)) The accompanying materials arc fully consistent with this provision, stating at one point that "[i]f you accept this conditional offer, you must retire on the date indicated in your offer letter," subject only to certain conditions imposed by management at its discretion. (Plaintiffs Response, Ex. 3, IPR package at 2.) Plaintiff acknowledges that she read the letter before signing it, and she does not contend that she was in any way coerced into accepting the offer of early retirement. Moreover, Plaintiff concedes that she did not attempt to revoke her acceptance until June 5, 2002, well after the March 28, 2002 cut-off date set forth in the letter.

Nonetheless, Plaintiff suggests two theories under which DaimlerChrysler could be deemed to have breached the early retirement agreement. First, she cites the various places, in both the letter and the accompanying materials, where the offer of early retirement is characterized as "conditional." The letter itself, for example, is captioned "2002 Incentive Program for Retirements Conditional Offer Letter." Plaintiff reasons that she was free to revoke her acceptance of this "conditional" offer until it was fully executed through the

completion of her final retirement paperwork. Yet, as DaimlerChrysler points out, the letter itself plainly discloses the conditions upon the offer of early retirement: (i) that "Management will make the final determination" of the employee's exact retirement date, choosing between April 30 and June 30, 2002; and (ii) that "Management will make a final selection of separations to be accepted under this Program on the basis of corporate service." (First Amended Complaint, Fix. A.) These conditions ran entirely in favor of the company—an employee's acceptance of the early retirement offer, in other words, was conditional upon management's authority to make the final selection of which employee offers to accept. Nothing in these conditions gave Plaintiff the power to rescind her acceptance after March 28, 2002.

Next, Plaintiff suggests that the terms of the IPR were modified by virtue of the assurances of two union benefit representatives, Tom Nizich and Kathy Scorpio-Butina, that she could revoke her acceptance at any time before she completed her final retirement paperwork. As an initial matter, Defendants correctly note the absence of any evidence that these two employees, who evidently did not hold any sort of management position, had the authority to bind DaimlerChrysler or modify the terms of the IPR through their oral representations to Plaintiff.[4]

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4. Indeed, because Plaintiff did not take the depositions of these individuals, and has not otherwise addressed the extent of their authority to bind their employer or the union through their statements about the proper construction of the terms of the IPR, it is not clear as an evidentiary matter that their hearsay statements concerning Plaintiff's opportunity to revoke her acceptance would be admissible at trial. *Cf.* Fed. R. Evid. 801(d)(2)(D).

More importantly, federal labor law forecloses any possible recourse to an individual side agreement, whether written or oral, that is inconsistent with the terms of the underlying CBA. Plaintiff contends, in essence, that the verbal assurances of union representatives Nizich and Scorpio-Autina gave rise to an individual contractual right, over and above the terms of the IPR, to revoke her acceptance at any time before she completed her final retirement paperwork. Yet, "[a] collective bargaining agreement . . . supersedes an individual employment contract to the extent that they are inconsistent." *Loewen Group International, Inc. v. Haberichter*, 65 F.3d 1417, 1423 (7th Cir. 1995); *see also J.I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 339, 64 S. Ct. 576, 581 (1943) (holding that "[i]ndividual contracts cannot subtract from collective ones"); *Maushund v. Earl C. Smith, Inc.*, 795 F.2d 589, 590 (6th Cir, 1986) ("The collective bargaining process prohibits [a represented employee] from engaging in separate negotiations with the company and precludes any actions to enforce such an agreement."); *cf. Wells v. General Motors Corp.*, 881 F.2d 166, 174 (5th Cir. 1989) (finding that state-law claims "founded upon contractual rights or common-law rights independent of those which the collectively-bargained agreement creates" are not preempted by the LMRA.). The inconsistency here could hardly be more pronounced—the acceptance given by other employees was irrevocable under the terms of the IPR letter, but Plaintiff remained free to revoke her acceptance under the individual agreement conferred upon her by Nizich and Scorpio-Butina. Plaintiff has cited no authority for the proposition that federal labor law would recognize such an individual agreement, in direct contravention of the collective deal struck on behalf of Plaintiff and her fellow union members by their designated bargaining representative.

A more promising avenue for Plaintiff, though one that she has failed to pursue in her submissions to the Court, rests upon the principle of estoppel. The Sixth Circuit has held that "[t]he equitable doctrines of estoppel and waiver are applicable in a section 301 action to enforce a labor contract." *Apponi v. Sunshine Biscuits, Inc.*, 809 F.2d 1210, 1217 (6th Cir. 1987). More recently, the Court confirmed that "[t]he federal common law of contract applicable under the LMRA includes the doctrine of promissory estoppel." *Anderson v. AT&T Corp.*, 147 F.3d 467, 477 (6th Cir. 1998). The Court has elaborated:

> The elements constituting estoppel, as defined by federal common law, are: (1) conduct or language amounting to a representation of material facts; (2) the party to be estopped must be aware of the true facts; (3) the party to be estopped must intend that the representation be acted on or act such that the party asserting the estoppel has a right to believe it so intended; (4) the party asserting the estoppel must be unaware of the true facts; and (5) the party asserting the estoppel must detrimentally and justifiably rely on the representation.

Apponi, 809 F.2d at 1217.

Plaintiff seemingly could establish at least some of these elements of a claim of estoppel. The statements allegedly made by union benefit representatives Nizich and Scorpio-Butina arguably qualify as representations of an undeniably material fact—namely, that Plaintiff could revoke her

acceptance of the early retirement offer at any time prior to her execution of the final retirement documents.[5] Next, in making these alleged statements, Nizich and Scorpio-Butina surely intended and understood that Plaintiff would use this information in her decision whether to accept the early retirement offer. Indeed, Plaintiff testified that she signed the IPR letter immediately after she was assured that she could still revoke her acceptance.

The evidence regarding the second prong of a claim of estoppel is somewhat more equivocal, however. The record is wholly silent as to Nizich's or Scorpio-Butina's awareness of the "true fact" that Plaintiff's acceptance was not revocable after March 28, 2002. One could presume, perhaps, that these union representatives surely must have known this fact, by virtue of the plain language of the IPR letter disclosing this information.[6] Yet, other evidence produced by Plaintiff herself casts doubt on this assumption. In particular, the June 20, 2002 letter received by Plaintiff from John Rudzinski, an International Benefit Representative for the UAW DaimlerChrysler Department, states that an employee's decision concerning a "regular retirement" is revocable "up till the last day of the month prior to the commencement of retirement benefits." (Plaintiff's Response, Ex. 10.) Thus, it

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5. Although these statements could also be construed as expressing a mere opinion—and not a particularly well-informed one, at that—the Court assumes for present purposes that they qualify as assertions of fact.

6. As discussed below, the self-evident nature of this fact might favor Plaintiff on this element of estoppel, but cuts sharply against her as to other elements.

is possible that Nizich and Scorpio-Butina responded to Plaintiff's inquiry by providing this "regular retirement" information, perhaps unaware that the IPR was governed by different rules. Moreover, while the Sixth Circuit has recognized that a speaker's "apparent authority" might "satisfy (or at least . . . stand in for) the awareness element" of a claim of estoppel, *Anderson*, 147 F.3d at 477, the Court already has noted the absence of evidence that Nizich or Scorpio-Butina had the authority to bind either the union or DaimlerChrysler through their statements about the terms of the IPR.

In any event, no reasonable trier of fact could conclude that Plaintiff has satisfied the fourth or fifth elements of an estoppel-based theory of recovery. Under the fourth prong, Plaintiff must show that she was "unaware of the true facts." Yet, she was expressly told, in the language of the IPR letter appearing directly above her signature, that her acceptance of the early retirement offer was "irrevocable after March 28, 2002." The Sixth Circuit has held that the "unawareness" element of a claim of estoppel encompasses both the facts actually known to a party and those which the party had the means to ascertain. *Trustees of Michigan Laborers' Health Care Fund v. Gibbons*, 209 F.3d 587, 593 (6th Cir. 2000). Even if Plaintiff did not actually read the IPR letter before she signed it—and she acknowledged otherwise at her deposition—she readily could have ascertained the deadline for revoking her acceptance, merely by noting the explicit and unambiguous disclosure of this deadline in the letter itself.

For similar reasons, Plaintiff cannot establish that she detrimentally and justifiably relied on the representations of Nizich and Scorpio-Rutina that she could revoke her acceptance beyond the March 28, 2002 deadline set forth in the IPR letter. In particular, while Plaintiff's deposition testimony indicates that she relied on these representations to her detriment, the evidence does not support a finding that this reliance was justified. In the analogous context of an ERISA-based claim of estoppel, the Sixth Circuit has emphasized that a "party's reliance can seldom, if ever, be reasonable or justifiable if it is inconsistent with the clear and unambiguous terms of plan documents available to or furnished to the party." *Sprague v. General Motors Corp.*, 133 F.3d 388, 404 (6th Or. 1998). The courts have adopted this reasoning in a number of other cases where the factual assertion purportedly relied upon is directly contradicted by the express, unambiguous terms of the parties' written agreement. *See, e.g., Gibbons*, 209 F.3d at 593-94; *Armbruster v. K-II Corp.*, 206 F. Supp.2d 870, 894 (E.D. Mich. 2002); *Easa v. Florists' Transworld Delivery Ass'n*, 5 F. Supp.2d 522, 526-27 (E.D. Mich. 1998). Again, the IPR letter here was direct and unambiguous in establishing a deadline of March 28, 2002 for revocation, and Plaintiff would not have been justified in relying on the alleged assertions of union representatives to the contrary. Accordingly, the Court finds that the record fails to support the breach-of-contract prong of Plaintiff's hybrid § 301 claim.

In addition, it appears doubtful that Plaintiff could establish the second prong of this claim, a breach of the union's duty of fair representation. "To meet [her] burden of proof as to the union's breach of its duty of fair representation,

a plaintiff must establish by substantial evidence that the union acted arbitrarily, discriminatorily or with bad faith." *Cotter*, 87 F. Supp.2d at 756. Regarding the alleged misstatements of union representatives Nizich and Scorpio-Rutina concerning Plaintiff's right to revoke her acceptance, the record indicates, at worst, that these statements rested upon a mistaken assumption that the "regular retirement" rules applied as well to the IPR. Such a mistaken judgment "would at most be negligence," and "[m]ere negligence is insufficient to establish a breach of the duty of fair representation," *Poole v. Budd Co.*, 706 F.2d 181, 184 (6th Cir. 1983). As for the union's decision not to pursue Plaintiff's grievance, the December 5, 2002 letter from UAW President Ron Gettelfinger sets forth the union's view that this grievance was based upon an interpretation of the IPR that the union deemed incorrect. These are "rational and objective grounds" for the union to decline to pursue Plaintiff's grievance, *Cotter*, 87 F. Supp.2d at 757, and therefore defeat any claim that the union acted arbitrarily, discriminatorily, or in bad faith in this matter.

C. Plaintiff Has Failed to State a Viable Claim under ERISA.

Having found no evidence to sustain a claim under § 301 of the LMRA, this leaves only Plaintiff's various ERISA-based theories of recovery. In support of their summary judgment motions, Defendants contend that ERISA does not reach the allegations made by Plaintiff in this case. The Court agrees.

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The reach of ERISA is undeniably broad, superseding "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). The IPR at issue here undoubtedly conferred "benefits" upon DaimlerChrysler employees, including a lump-sum severance payment and a credit toward the purchase or lease of a vehicle. Yet, in *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211 (1987), the Supreme Court held that ERISA did not preempt a Maine statute mandating one-time severance payments to employees in the event of a plant closing, reasoning that such a one-time payment did not give rise to an ongoing administrative scheme that reasonably could be termed a "plan."

Based on the reasoning of *Fort Halifax* and other Supreme Court decisions addressing the preemptive scope of ERISA, the courts have held that claims involving early retirement programs are not governed by ERISA, absent a substantial link between the claim and an employee benefit plan. In *Wells v. General Motors Corp.*, 881 F.2d 166, 175-76 (5th Cir. 1989), for example, the Fifth Circuit relied on *Fort Halifax* in concluding that a voluntary termination program with severance pay was not an "employee benefit plan" within the meaning of ERISA. Accordingly, the Court found that ERISA did not preempt the plaintiffs' state-law claims that they had been fraudulently induced to accept this program.

Similarly, in *Forbus v. Sears Roebuck & Co.*, 30 F.3d 1402, 1405-06 (11th Cir. 1994), the Eleventh Circuit found that ERISA did not preempt a claim that an employer had fraudulently induced the plaintiff employees to accept a

retirement package by falsely stating that their facility was closing and their jobs would be eliminated. In so ruling, the Court distinguished prior cases in which employees had retired in reliance on false representations about the retirement benefits they would receive. *See Forbus*, 30 F.3d at 1406. The Court reasoned that the alleged misrepresentation in the case before it "did not involve a benefit plan—it involved the very existence of the plaintiffs' jobs." 30 F.3d at 1406. Nor was a finding of preemption warranted, in the Court's view, by the "mere fact that the plaintiffs' damages may be affected by a calculation of pension benefits." 30 F.3d at 1406-07.

This Court previously has reached a similar conclusion, albeit in the somewhat distinct context of "complete preemption." In *Hanks v. General Motors Corp.*, 26 F. Supp.2d 977, 978-79 (E.D. Mich. 1998), the plaintiff employee had been receiving workers' compensation benefits for a number of years, and then inquired of her employer, defendant General Motors, whether these benefits would be jeopardized if she began collecting benefits from her employer-sponsored pension plan. A General Motors employee assured the plaintiff that she could simultaneously receive both workers' compensation and pension benefits, and she began drawing pension benefits in reliance on this representation. A short time later, her workers' compensation benefits were terminated pursuant to a coordinated benefits clause in the governing insurance policy. The plaintiff then brought suit in state court, asserting claims of fraudulent and negligent misrepresentation.

General Motors removed the case to federal court, contending that the plaintiff's state-law claims were

completely preempted under ERISA. This Court remanded the case to state court, however, reasoning that the doctrine of complete preemption did not apply because the plaintiff was "not attempting to recover benefits due under the terms of" the General Motors pension plan. *Hanks*, 26 F. Supp.2d at 983. Rather, the plaintiff sought "to rescind her decision to draw [pension] benefits on the grounds that [her employer] allegedly made misrepresentations which led her to believe she was entitled to workers' compensation benefits ***in addition to*** the benefits due under the [pension plan] itself." 26 F. Supp.2d at 983. Thus, the Court found that the plaintiff's state-law claims "only tangentially implicate[d] the ERISA benefits plan" offered by her employer. 26 F. Supp.2d at 983.

Although *Hanks* addresses complete rather than ordinary preemption, it is entirely consistent with the above-cited decisions in recognizing that ERISA does not reach any and all claims that "tangentially implicate" an employee benefit plan. These rulings arc fully applicable here, where the lump-sum payments promised under DaimlerChrysler's IPR did not give rise to an "employee benefit plan" governed by ERISA. Nor do Plaintiff's claims and allegations directly implicate the terms of any employee benefit plan offered by her employer; she does not assert, for example, that her acceptance of the IPR offer was based upon any sort of misrepresentation about the types or amounts of retirement benefits she would receive.

Indeed, Plaintiff has given no reason whatsoever for seeking to revoke her acceptance. Rather, she more broadly asserts that the period of revocation had not yet closed at the time she changed her mind, so that she was free to revoke

her acceptance for any reason whatsoever. As in *Forbus*, the alleged misrepresentation here concerns Plaintiff's right to continued employment, and not merely her right to a different level of benefits. Plaintiff seeks "to set aside and escape from the early retirement agreement, not to recover under it or to 'enforce' it or to assert rights to future benefits under the teens of the plan.'" *Warner v. Ford Motor Co.*, 46 F.3d 531, 534 (6th Cir. 1995) (holding, as in *Hanks*, that such a claim is not completely preempted under ERISA). Although Plaintiff's plea for damages might encompass benefits under various DaimlerChrysler plans, the above-cited cases hold, and Sixth Circuit precedent confirms, that this sort of indirect involvement, of an employee benefit plan does not trigger ERISA preemption. *See Wright v. General Motors Corp.*, 262 F.3d 610, 615 (6th Cir. 2001); *Forbus*, 30 F.3d at 1406-07. Consequently, the Court finds that ERISA affords no remedy in this case, and that Plaintiff's claims instead are governed by the standards of § 301 of the LMRA.

In any event, any such ERISA claim in this case would face considerable difficulty on the merits. Even if ERISA were deemed to govern the DaimlerChrysler IPR, ERISA plans, like CBAs, generally are resistant to attempts at oral modification. *See Sprague*, 133 F.3d at 402-03. Consequently, Plaintiff's best resort again would be to an estoppel-based theory of recovery. Yet, the Sixth Circuit has applied precisely the same five-part estoppel standard to claims under the LMRA and ERISA alike. *See Sprague*, 133 F.3d at 403-04; *Armistead v. Vernitron Corp.*, 944 F.2d 1287, 1298-1300 (6th Cir. 1991). Thus, in light of the unambiguous provisions of the IPR itself, a claim of estoppel here would fare no better under ERISA than under the LMRA. *See Sprague*, 133 F.3d at 404.

This leaves only Plaintiff's contention that Defendants breached a fiduciary duty owed under ERISA. As explained in *Sprague*, an employer may act "in a fiduciary capacity when it explain[s] its retirement program to [its] early retirees." *Sprague*, 133 F.3d at 405. This rule extends only to explanations of "plan benefits," however, *see Sprague*, 133 F.3d at 405, and hence is unavailing to Plaintiff in this case, where the Court already has concluded that the IPR does not qualify as a "plan" under ERISA.

Moreover, the Court previously has noted the complete absence of evidence that the individuals who purportedly explained the IPR to Plaintiff, Tom Nizich and Kathy Scorpio-Butina, had the authority to bind either Defendant through their statements. To be sure, the Court has little reason to doubt the assertion that individuals in the role of "union benefit representatives" have been granted the authority to answer the benefit questions of union members. Yet, such an assertion necessarily must rest upon ***some*** evidentiary foundation, and Plaintiff simply has failed to provide one here. Accordingly, Defendants are entitled to summary judgment in their favor on Plaintiffs ERISA-based theories of recovery.

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IV. CONCLUSION

For the reasons set forth above,

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant DaimlerChrysler Corporation's February 28, 2003 Motion for Summary Judgment is GRANTED. IT IS FURTHER ORDERED that Defendant UAW Local 1264's March 4, 2003 Motion for Summary Judgment also is GRANTED.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge

APPENDIX F — JUDGMENT OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION DATED MARCH 31, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 02-72659
Hon. Gerald E. Rosen

JOYCE ANNE DABISH,

Plaintiff,

v.

DAIMLERCHRYSLER CORPORATION, INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE, AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and STERLING STAMPING PLANT UNITED AUTOMOBILE WORKERS LOCAL 1264,

Defendants.

JUDGMENT OF DISMISSAL

At a session of said Court, held in the U.S. Courthouse, Detroit, Michigan on *MAR 31 2004*

PRESENT: Honorable Gerald E. Rosen
United States District Judge

Appendix F

The Court having this day entered an Opinion and Order granting Defendants' Motions for Summary Judgment,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this case be, and hereby is, DISMISSED.

s/ Gerald E. Rosen
Gerald E. Rosen
United States District Judge